

SERVED: September 4, 1998

NTSB Order No. EA-4700

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of September, 1998

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15295
v.)	
)	
L. MICHAEL WILLIFORD,)	
)	
Respondent.)	
_____)	

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the appeal in this emergency revocation proceeding because it was not, as required by Section 821.57(b) of the Board's Rules of Practice,¹ perfected

¹Section 821.57(b) provides, in pertinent part, as follows:

§ 821.57 Procedure on appeal.

* * * * *

(b) *Briefs and oral argument.* Unless otherwise authorized by the Board, all briefs in emergency cases shall be served via overnight delivery or facsimile confirmed by first class mail. Within 5 days after the filing of the notice of appeal, the appellant shall file a brief with the Board and serve a copy on the other parties. . . . Appeals may be dismissed by the Board on its own initiative or on motion of a party. . . in cases where a party fails to perfect the notice of appeal by filing a timely brief.

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by the timely filing of an appeal brief by August 14, 1998; that is, within 5 days after the notice of appeal from the August 7 initial decision was filed on August 9.² The motion will be granted.

In support of the motion to dismiss, the Administrator asserts that although the respondent, by counsel, included with his appeal brief a certificate suggesting that service on her and the Board had been accomplished via Federal Express on August 14, 1998, which was a Friday, documentation accompanying the brief reflects that it either was not given to Federal Express, for overnight delivery, until Monday, August 17, or that, if it were in fact deposited at a Federal Express pick up location on the 14th, it was left there after the last scheduled pick up for that date.³ Since our rules of practice require that an appeal brief in an emergency case be filed either by facsimile (confirmed by first class mail) or by overnight (next day) delivery,⁴ the Administrator maintains that respondent's brief was filed one day late. We agree.

As the Administrator points out, we addressed the same issue in Administrator v. Excalibur Aviation, NTSB Order No. EA-4465 (1996).⁵ We there stated that we would not, in future cases,

²The law judge affirmed an emergency order of the Administrator revoking respondent's Commercial Pilot Certificate (No. 465434334) for his alleged violations of section 61.15(e), 67.403(a) and (c) of the Federal Aviation Regulations, 14 CFR Parts 61 and 67. Specifically, respondent was alleged to have failed to have reported an alcohol-related motor vehicle action (a conviction involving driving while under the influence of alcohol), to have made fraudulent or intentionally false statements concerning that motor vehicle-related action on two applications for airman medical certificates, and to have made an incorrect statement, upon which the FAA relied, in support of one of the two applications for an airman medical certificate. The law judge did not credit respondent's disavowal of intent to falsify the applications. Respondent's appeal is primarily a challenge to that credibility assessment.

³The Federal Express tracking label on the package containing the brief states: "STANDARD OVERNIGHT TUE...Deliver by: 18 AUG 98." Moreover, the Board's copy of the "FedEx USA Airbill," like the Administrator's, has "17" handwritten over the typed 14 Aug 98 date entered by the sender, and the Board, like the Administrator, did not receive its copies of the brief until August 18.

⁴See Section 821.57(b), supra.

⁵Coincidentally, the attorney who represented Excalibur Aviation also represents the respondent in this matter.

"automatically" accept the date of filing on a certificate of service where a different date seemed to be warranted by the overnight delivery service's documentation. We conclude on the circumstances of this case that the August 17 date on the Federal Express airbill should be used because it appears to reflect the earliest date on which Federal Express can be said to have received, for purposes of next day delivery, the respondent's brief. In this connection, we note that the certificate of service sent with the brief is not necessarily inconsistent with delivery of respondent's brief to a Federal Express location on August 14 beyond the last scheduled pick up: "I hereby certify that I have this day [*i.e.*, August 14] caused to be delivered by Federal Express...." Such a certification, however, does not establish that respondent filed his brief on time.⁶ This is so because our rule dictates that service be made in a manner that ensures overnight, or next business day, delivery; that is, in this case, no later than August 17. Since this did not occur, respondent must be deemed to have filed his brief on the date on which the Federal Express record shows collection of the package containing it for overnight delivery, not the date on which the

⁶The respondent's answer to the motion to dismiss makes no representation that copies of his appeal brief were in fact deposited in a Federal Express drop box before the posted time for a last (or perhaps only) pick up on August 14. Instead, his counsel requests that a hearing be held to resolve that issue if a genuine dispute exists over whether a timely tender of the briefs to Federal Express was made. We see no need for a hearing. Since the Administrator's motion directly challenged the timeliness of the respondent's filing, the respondent, in responding to the motion, should have advanced whatever information or proof, by affidavit or otherwise, that he had to demonstrate that he had filed his brief on time. His submission, however, neither identified the last scheduled pick up time at the Federal Express location he chose to use nor asserted that his drop off of the briefs was prior to the Federal Express deadline for next business day delivery. Rather, he indicated, by affidavit of counsel, only that he had asked someone he characterizes as "the attendant" if the last pick up of the day had been made and was told that it had not been. However, inasmuch as the advice respondent received turned out to be inaccurate, in that the appeal briefs were not collected until the 17th, it is of no consequence, for purposes of establishing the timeliness of respondent's filing, that he believed he had tendered the briefs before the last collection had been made; the only relevant issue here is whether the tender was in fact made before the posted deadline. In light of respondent's failure to show that it was, the evidence supporting a conclusion that it was not (that is, among other circumstances, the collection of the briefs on the 17th for delivery on the 18th) compels a finding that the Board's deadline for filing an appeal brief in an emergency case was not met.

package was made available to Federal Express for collection on some subsequent date.

In the absence of good cause to excuse respondent's failure to file a timely appeal brief, his appeal must be dismissed. See, e.g., Administrator v. Mace, 7 NTSB 478 (1990)(emergency revocation proceeding), citing Administrator v. Hooper, 6 NTSB 559 (1988), aff'd 948 F.2d 781 (D.C. Cir. 1991).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted; and
2. The respondent's appeal is dismissed.

HALL, CHAIRMAN, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.